162 U.S. 478

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1895.

No. 137.

ELENA CAMPBELL, PLAINTIFF IN ERROR,

vs.

GEORGEANN PORTER, CARLILE P. PORTER, ET AL.

IN ERROR TO THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

FILED JULY 20, 1892.

(15,084.)

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JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C., AUGUST 2, 1895.

1 In the Supreme Court of the District of Columbia.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Be it remembered that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

2 *Citation vs. Elena Campbell.*

No. 4289, Adm'n Doc. 16. Wm. B. Webb, proctor.

In the Supreme Court of the District of Columbia, Special Term for Orphans' Court Business.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

On motion of the executors.

The United States of America to Daniel M. Ransdell, U. S. marshal, D. C., Greeting:

You are hereby commanded to cite and summon Elena Campbell, 1733 De Sales St. (wife of Chas. H. Campbell), that she appear before a special term for orphans' court business of the supreme court of the District of Columbia, to be held at the city of Washington, in and for said District, on Friday, the 6th day of March, A. D. 1891, at one o'clock p. m., to show cause, if any she has, why the will and codicil of said deceased should not be proved and admitted to probate and record and letters testamentary granted unto the executors by said will appointed.

Witness Andrew C. Bradley, justice holding the special term of said supreme court for orphans' court business, this 27th day of February, A. D. 1891.

Seal of Orphans' Court.

Test: L. P. WRIGHT,
Register of Wills for the District of Columbia.

Cited and summoned Elena Campbell as within directed Feb'y 27th, 1891.

D. M. RANSDELL, *Marshal.*

3 *Petition for Letters Testamentary.*

Filed March 6, 1891.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

To the honorable the supreme court of the District of Columbia, holding a special term for orphans' court business:

The petition of Georgeann Porter, Carlile P. Porter, Theodoric Porter, and Richard B. Porter respectfully represents that all of your petitioners are citizens of the United States, and that all except the said Theodoric Porter, who is a resident of Annapolis, are residents of the city of Washington, in the District of Columbia; that David D. Porter, the person on whose estate letters testamentary are desired, died in the city of Washington, District of Columbia, on the 13th day of February, 1891; that his last domicil was the city of Washington, in said District; that the personal property belonging to the said deceased consisted of household furniture, carriages, and horses, and its estimated value is fifteen thousand dollars ($15,000), and it is all now situated in the city of Washington; that the deceased died testate, his last will and testament being now on file in this court; that the next of kin of the said deceased are Georgeann Porter, Carlile P. Porter, Elizabeth C. Logan, Elena Campbell, and Richard B. Porter, all of whom are residents of the city of Washington aforesaid; David Essex Porter, who is a resident of Baltimore, in the State of Maryland, and Theodoric Porter, who is a resident of Annapolis, in said State, all of whom are adults; that the said deceased in his last will and testament appointed as the executors thereof your petitioners, and provides that they shall not be required to give bonds as such executors.

4 Your petitioners pray therefor- that an order be passed by the court granting letters testamentary to them under the said will and in conformity with the provisions thereof with respect to the bond usually required by law; and so, as in duty bound, will they ever pray, &c.

GEORGEANN PORTER.
CARLILE P. PORTER.
THEODORIC PORTER.
RICHARD B. PORTER.

DISTRICT OF COLUMBIA, *To wit:*

I do solemnly swear that I have read the petition by me subscribed and know the contents thereof, and that the facts therein stated upon my personal knowledge are true, and that those stated upon information and belief I believe to be true.

THEODORIC PORTER.

Subscribed and sworn to before me March 6th, 1891.

[NOTARIAL SEAL.] M. J. GRIFFITH,
Notary Public.

Waiver of Citation.

Filed March 6th, 1891.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

The undersigned, next of kin of David D. Porter, deceased, being acquainted with the contents of the petition of Georgeann Porter, Carlile P. Porter, Theodoric Porter, and Richard B. Porter, bearing date on the — day of ——, A. D. 1891, hereby waive citation or publication of advertisement so far as they are concerned and consent that the court may act upon said petition without further notice to them.

ELIZABETH C. LOGAN.
DAVID ESSEX PORTER.

Will of David D. Porter.

Know all persons, that I, David D. Porter, admiral U. S. Navy, being of sound and disposing mind, do will and bequeath my estate as follows:

I bequeath all my real and personal estate, wherever situated, to my wife Georgeann Porter, in trust, for her benefit during her life and at her death to be divided among my children—Carlile P. Porter, Theodoric Porter, Richard B. Porter, Elizabeth Logan and Elena Porter, their heirs and assigns, and I bequeath an equal (one-sixth) portion of my above-mentioned real and personal estate to the children of my son David Essex Porter, which is to be invested in good securities by my executors and the income thereof paid annually to my son David Essex and his wife Lily Porter, until their sons Richard and David reach the age of twenty-five years, when the said Richard and David are to be put in possession of one-fifth their share in the property, and at the death of their father and mother they are to be placed in full possession of their one-sixth share of my estate—provided that they are good and proper men, not addicted to gambling or drinking. If they are addicted to such habits they shall receive only the income from their one-sixth share of my estate.

My house on H street N. W. in the city of Washington, shall be kept in repair and rented for the sole benefit of my wife Georgeann Porter during her life, and in case the rent of the said house is not sufficient for her maintenance, my executors will sell my property on Connecticut avenue N. W. between Q and R streets N. W. in the city of Washington, and invest the proceeds in good securities, the

interest thereof to be paid to my said wife during her lifetime.
6 At her death, should she survive me, my property real and personal, shall be divided among my heirs in the manner heretofore set forth.

In case my wife, Georgeann Porter, thinks proper, she can, with the consent of the co-trustees, convey the cottage and appurtenances at Falls Church, Virginia, to Mrs. Lily Porter, wife of David Essex Porter, and her children Richard and David.

I appoint my wife, Georgeann Porter, and my sons Carlile P. Porter, Theodoric Porter and Richard B. Porter, executors of this my last will and testament, neither of whom will be required to give bonds.

Witness my hand and seal, this twelfth day of November, 1889.

DAVID D. PORTER. [SEAL.]

Witnesses:
WILLIAM WILKES, *Messenger.*
J. M. ALDEN.
CHAUNCEY THOMAS.

I hereby declare that the executors of my will shall not receive any compensation for their services.

DAVID D. PORTER.

Codicil, June 4, 1890.

In case my daughter, Elena Porter, should marry and have heirs, the property she may receive from my estate shall at her death descend to said heirs, but if she should have no children or the children should die, the property will descend to the following persons, viz: the children of David E. Porter, Carlile P. Porter, Theodoric Porter, Elizabeth C. Logan and Richard B. Porter, and my executors will so invest the proceeds of such property as I may leave to Elena Porter that during her life she may draw interest on the same, to be paid her semi-annually.

DAVID D. PORTER. [SEAL.]

Witnesses:
J. M. ALDEN.
WILLIAM WILKES, *Messenger.*
CHAUNCEY THOMAS.

7 DISTRICT OF COLUMBIA, *To wit:*

On the 19th day of February, 1891, came Carlile P. Porter and Richard B. Porter and made oath on the Holy Evangels of Almighty God that they do not know of any will or codicil of David D. Porter, admiral U. S. Navy, late of said District, deceased, other than the aforegoing instrument of writing, and that they found the same among his private papers at his residence, No. 1710 H street N. W., after his death; and said David D. Porter died on or about the 13th day of February, 1891.

CARLILE P. PORTER.
RICHARD B. PORTER.

Sworn to and subscribed before me—

[NOTARIAL SEAL.] M. J. GRIFFITH,
Notary Public for the District of Columbia.

Order Admitting to Probate and Certifying to General Term.

Filed March 11, 1891.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In Re Estate of DAVID D. PORTER, Deceased.

The application to admit to probate the paper-writing dated the 12th of November, 1889, purporting to be the last will and testament of David D. Porter, and the paper-writing dated June 4, 1890, purporting to be a codicil thereto, both said paper-writings being in the custody of the register of wills and made part hereof, came on to be heard this 6th of March, 1891, and thereupon Elena Campbell, mentioned in said paper-writing as Elena Porter, having been cited, appeared by W. D. Davidge, her solicitor, who in her behalf demanded full proof of the execution of the said paper-writings.

Thereupon the witnesses to the first-mentioned paper-writing,
8 J. M. Alden, Chauncey Thomas, and William Wilkes, being duly called and examined by the court, testified that at or about the date of the said paper-writing they saw the said David D. Porter, said deceased, sign the said paper-writing and heard him acknowledge the same to be his last will and testament, and that thereupon the said witnesses, at his request, subscribed their names to the said paper-writing as witnesses.

The said J. M. Alden and Chauncey Thomas further testified as to the second paper-writing, purporting to be a codicil, that at or about the date of said paper they saw the said David D. Porter, since deceased, sign the said paper-writing, and that thereupon the said witnesses, at his request, subscribed their names to the said paper-writing as witnesses, and that when the said paper-writing was signed by the said David D. Porter and the said witnesses the said William Wilkes, whose name purports to be signed thereto as a witness, was not present in the room when said execution and attestation took place.

The said William Wilkes testified that he was employed as a servant of the said David D. Porter, at his house in the city of Washington, D. C., and that the signature "William Wilkes, messenger," affixed to said paper-writings, is his genuine handwriting; that he, being in the lower part of the said house, was summoned by the bell to attend the said room, being the office where the said David D. Porter transacted business; that when witness entered the said room and during his stay David D. Porter and J. M. Alden were there, but no one else; that when the witness entered the room the said David D. Porter pointed to a paper on the table and said, "Sign that paper;" that thereupon the witness signed the paper and left the room; that the paper so signed is the same now shown him;

that there was no acknowledgment of the nature of the paper nor of the signature of the said David D. Porter, nor can the witness say whether the said signature was then upon the paper or not.

9 The said J. M. Alden, Chauncey Thomas, and William Wilkes testified that the said David D. Porter was of sound and disposing mind when they signed the said paper-writings.

And the foregoing being all the evidence, the court hereby orders and adjudges that the first-mentioned paper-writing be, and the same is hereby, admitted to probate as the last will and testament of the said David D. Porter as to both real and personal property, and that the other paper-writing purporting to be a codicil be, and the same is hereby, admitted to probate in respect of personal property, and that the question as to the sufficiency of the said paper-writing to devise or dispose of real estate be, and the same is hereby, certified to the court in general term for hearing in the first instance upon the evidence aforesaid.

A. C. BRADLEY, *Justice.*

Order Granting Letters Testamentary.

Filed March 11, 1891.

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

On consideration of the petition of Georgeann Porter, Carlile P. Porter, Theodoric Porter, and Richard B. Porter, and other papers filed in the above matter, it is by the court, this 11th day of March, 1891, ordered that letters testamentary be issued and granted to the said petitioners upon the estate of the said David D. Porter, upon their filing a bond in this court, with sureties to be approved by the court, in the penalty of twenty thousand dollars, conditioned for the faithful performance of their duties as executors as aforesaid.

A. C. BRADLEY, *Justice.*

10 *Order to Calendar.*

In the Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In Re the Estate of DAVID D. PORTER, Deceased. No. 4289, Admtr. Doc. 16.

The clerk is hereby directed to place the appeal prayed from the order made in the above-entitled cause by the court holding a special term for orphans' court business upon the calendar of the general term, it having been accidently omitted.

W. D. DAVIDGE,
Sol'r for Appl.
WEBB & WEBB,
Sol'rs for App'ees.

Jan'y 5, '92.

Decree in General Term.

Filed April 6, 1892.

In the Supreme Court of the District of Columbia, in General Term.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

This cause coming on to be heard in the first instance before this court, and having been argued by counsel and considered by the court, it is this 6th day of April, A. D. 1892, adjudged, ordered, and decreed that the codicil to the will of David D. Porter, deceased, bearing date on the 4th day of June, A. D. 1890, be, and the same is hereby, declared to be sufficiently attested and subscribed to pass title to the real estate of the said testator. Remanded to orphans' court for further proceedings.

E. F. BINGHAM, *C. J.*

11 *Order Revoking, &c.*

Filed May 4, 1892.

In the Supreme Court of the District of Columbia, in General Term.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

On motion and by consent of parties it is this fourth day of May, A. D. 1892, ordered, adjudged, and decreed that the order heretofore passed in the above-entitled cause on the 6th day of April, A. D. 1892, be, and the same is hereby revoked and set aside.

By the court:

E. F. BINGHAM, *C. J.*

Order Declaring, &c.

Filed May 4, 1892.

In the Supreme Court of the District of Columbia, in General Term.

In the Matter of the Estate of DAVID D. PORTER, Deceased.

The application to the court in special term to admit to probate as a devise of real estate the paper-writing purporting to be a codicil to the last will and testament of David D. Porter, ordered to be heard in general term in the first instance, was duly heard, and the court finding upon the facts set out in the order of the special term that the said paper-writing was duly executed by the testator and subscribed and attested by three witnesses, as required by law, it is thereupon considered that the said paper-writing be, and the
12 same is hereby, admitted to probate as a devise of real estate.

By the court:

E. F. BINGHAM, *C. J.*

Bond, to operate as a supersedeas, fixed at $500.00.

By the court:

E. F. BINGHAM, *C. J.*

Bill of Exceptions.

Filed May 4, 1892.

In the Supreme Court of the District of Columbia, in General Term, April, 1892.

In Re the Estate of DAVID D. PORTER, Deceased.

At the hearing of the application by Georgeann Porter, Carlile P. Porter, Theodoric Porter, and Richard B. Porter, executors, to admit to probate the paper-writing purporting to be a codicil to the last will and testament of David D. Porter, deceased, as a devise or disposition of real estate, which application was by order of the justice holding the special term certified to this court for hearing in the first instance upon the evidence certified in the said order, the said propounders of the said codicil as a devise of real estate submitted to the court the following transcript of the record and proceedings of the special term:

Transcript of Record.

Know all persons, that I, David D. Porter, admiral, U. S. Navy, being of sound and disposing mind, do will and bequeath my estate as follows:

I bequeath all my real and personal estate, wherever situated, to my wife, Georgeann Porter, in trust, for her benefit during her life, and at her death to be divided among my children, Carlile P. Porter, Theodoric Porter, Richard B. Porter, Elizabeth Logan, and Elena Porter, their heirs and assigns, and I bequeath an equal (one-
sixth) portion of my above-mentioned real and personal
13 estate to the children of my son David Essex Porter, which is to be invested in good securities by my executors, and the income thereof paid annually to my son David Essex and his wife Lily Porter until their sons Richard and David reach the age of twenty-five years, when the said Richard and David are to be put in possession of one-fifth their share in the property, and at the death of their father and mother they are to be placed in full possession of their one-sixth share of my estate—provided that they are good and proper men, not addicted to gambling or drinking. If they are addicted to such habits they shall receive only the income from their one-sixth share of my estate.

My house on H street N. W., in the city of Washington, shall be kept in repair and rented for the sole benefit of my wife, Georgeann Porter, during her life, and in case the rent of the said house is not sufficient for her maintenance, my executors will sell my property on Connecticut avenue N. W., between Q and R streets N. W., in the city of Washington, and invest the proceeds in good securities, the interest thereof to be paid to my said wife during her lifetime. At her death, should she survive me, my property, real and personal, shall be divided among my heirs in the manner heretofore set forth.

In case my wife, Georgeann Porter, thinks proper, she can, with the consent of the cotrustees, convey the cottage and appurtenances at Falls Church, Virginia, to Mrs. Lily Porter, wife of David Essex Porter, and her children Richard and David.

I appoint my wife, Georgeann Porter, and my sons, Carlile P. Porter, Theodoric Porter, and Richard B. Porter, executors of this my last will and testament, neither of whom will be required to give bonds.

Witness my hand and seal, this twelfth day of November, 1889.

DAVID D. PORTER. [SEAL.]
WILLIAM WILKES, *Messenger.*

Witnesses:
J. M. ALDEN.
CHAUNCEY THOMAS.

I hereby declare that the executors of my will shall not
14 receive any compensation for their services.

DAVID D. PORTER.

Codicil, June 4, 1890.

In case my daughter, Elena Porter, should marry and have heirs, the property she may receive from my estate shall at her death descend to said heirs, but if she should have no children or the children should die, the property will descend to the following persons, viz: The children of David E. Porter, Carlile P. Porter, Theodoric Porter, Elizabeth C. Logan, and Richard B. Porter, and my executors will so invest the proceeds of such property as I may leave to Elena Porter that during her life she may draw interest on the same, to be paid her semi-annually.

DAVID D. PORTER. [SEAL.]
WILLIAM WILKES, *Messenger.*

Witnesses:
J. M. ALDEN.
CHAUNCEY THOMAS.

DISTRICT OF COLUMBIA, *To wit:*

On the 19th day of February, 1891, came Carlile P. Porter and Richard B. Porter and made oath on the Holy Evangels of Almighty God that they do not know of any will or codicil of David D. Porter, admiral U. S. Navy, late of said District, deceased, other than the aforegoing instrument of writing, and that they found the same among his private papers at his residence, No. 1710 H street N. W., after his death, and said David D. Porter died on or about the 13th day of February, 1891.

CARLILE P. PORTER.
RICHARD B. PORTER.

Sworn to and subscribed before me—

M. J. GRIFFITH,
[SEAL.] *Notary Public for the District of Columbia.*

15 Supreme Court of the District of Columbia, Holding a Special Term for Orphans' Court Business.

In Re Estate of DAVID D. PORTER, Deceased.

The application to admit to probate the paper-writing dated the 12th of November, 1889, purporting to be the last will and testament of David D. Porter, and the paper-writing dated June 4, 1890, purporting to be a codicil thereto, both said paper-writings being in the custody of the register of wills and made part hereof, came on to be heard this 6th of March, 1891; and thereupon Elena Campbell, mentioned in said paper-writing as Elena Porter, having been cited, appeared by W. D. Davidge, her solicitor, who in her behalf demanded full proof of the execution of the said paper-writings. Thereupon the witnesses to the first-mentioned paper-writing, J. M. Alden, Chauncey Thomas, and William Wilkes, being duly called and examined by the court, testified that at or about the date of the said paper-writing they saw the said David D. Porter, said deceased, sign the said paper-writing and heard him acknowledge the same to be his last will and testament, and that thereupon the said witnesses at his request subscribed their names to the said paper-writing as witnesses.

The said J. M. Alden and Chauncey Thomas further testified as to the second paper-writing, purporting to be a codicil, that at or about the date of said paper they saw the said David D. Porter, since deceased, sign the said paper-writing, and that thereupon the said witnesses, at his request, subscribed their names to the said paper-writing as witnesses, and that when the said paper-writing was signed by the said David D. Porter and the said witnesses the said William Wilkes, whose names purports to be signed thereto as a witness, was not present in the room when said execution and attestation took place.

Before the said William Wilkes signed the said paper-writing it had in fact been executed by the testator and subscribed and attested by the two witnesses, J. M. Alden and Chauncey Thomas.

16 The said William Wilkes testified that he was employed as a servant of the said David D. Porter at his house in the city of Washington, D. C., and that the signature "William Wilkes, messenger," affixed to said paper-writing is his genuine handwriting; that he, being in the lower part of the said house, was summoned by the bell to attend the said room, being the office where the said David D. Porter transacted business; that when witness entered the said room and during his stay David D. Porter and J. M. Alden were there, but no one else; that when the witness entered the room the said David D. Porter pointed to a paper on the table and said, "Sign that paper;" that thereupon the witness signed the paper and left the room; that the paper so signed is the same now shown him; that there was no acknowledgment of the nature of the paper nor of the signature of the said David D. Porter, nor can the witness say whether the said signature was then upon the paper or not.

The said J. M. Alden, Chauncey Thomas, and William Wilkes

testified that the said David D. Porter was of sound and disposing mind when they signed the said paper-writings.

And the foregoing being all the evidence, the court hereby orders and adjudges that the first-mentioned paper-writing be, and the same is hereby, admitted to probate as the last will and testament of the said David D. Porter as to both real and personal property, and that the other paper-writing, purporting to be a codicil, be, and the same is hereby, admitted to probate in respect of personal property, and that the question — to the sufficiency of the said paper-writing to devise or dispose of real estate be, and the same is hereby, certified to the court in general term for having in the first instance upon the evidence aforesaid.

A. C. BRADLEY, *Justice.*

Supreme Court of the District of Columbia.

Office of the register of wills.

DISTRICT OF COLUMBIA, *To wit:*

I hereby certify that the aforegoing is a true copy of the
17 original last will and testament and codicil of David D. Porter, deceased, and order in relation thereto filed and recorded in the office of the register of wills for the District of Columbia.

Witness my hand and the seal of the supreme court of the District of Columbia, special term for orphans' court business, this 29th day of May, A. D. 1891.

[SEAL.]

J. P. WRIGHT,
Register of Wills District of Columbia.

And thereupon it was objected by W. D. Davidge, Esq., counsel for Elena Campbell, who is mentioned and referred to in the said last will and testament and codicil as Elena Porter, she having afterwards intermarried, that the said codicil ought not to be admitted to probate as a devise of real estate for the reason that the evidence certified did not show that the said codicil was duly subscribed and attestested by three witnesses, as required by law, but that in respect of one of the witnesses, William Wilkes, the testator neither signed in the presence of the said witness nor acknowledged his signature or the nature of the instrument to the said witness, so that the said witness attested nothing, and for other reasons apparent on the face of the said order; but the objections of the said counsel were overruled by this court, and the said codicil was upon the evidence aforesaid adjudged sufficient as a devisee of real estate and admitted to probate as such; and to the said ruling and judgment of the court the said Elena Campbell, by her said counsel, excepts and prays the court to sign and seal this bill of exceptions, which is accordingly done this 4th day of May, 1892.

It is further certified that the difference in value of the real estate as devised by the said last will and testament in fee-simple to

the said Elena Campbell and as restricted to a life estate by
18 the codicil, if such be the meaning thereof, exceeds the sum of five thousand dollars.

E. F. BINGHAM, *C. J.* [L. S.]
WALTER S. COX. [L. S.]
CHARLES P. JAMES. [L. S.]

19 *Bond for Writ of Error.*

Filed June 22, 1892.

In the Supreme Court of the District of Columbia, the 19th Day of May, 1892.

In Re the Estate of DAVID D. PORTER, Deceased. No. 4289, Orphans' Court Docket.

Know all men by these presents that we, Elena Campbell, C. H. Campbell, and J. R. Bromwell, are bound unto Georgeann Porter, Carlile P. Porter, Theodoric Porter, and Richard B. Porter in the sum of five hundred dollars ($500), to be paid to the said Georgeann Porter, Carlile P. Porter, Theodoric Porter, and Richard B. Porter, their executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated the — day of May, 1892.

Whereas the above-named Elena Campbell has prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above suit by the said supreme court of the District of Columbia:

Now, therefore, the condition of this obligation is such that if the above-named Elena Campbell shall prosecute her said appeal to effect and answer all damages and costs if she shall fail to make good her plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

ELENA CAMPBELL. [SEAL.]
C. H. CAMPBELL. [SEAL.]
J. R. BROMWELL. [SEAL.]

Sealed and delivered in presence of—
W. D. DAVIDGE, JR.

Approved the 22d day of June, 1892, and ordered to operate as a supersedeas.

E. F. BINGHAM,
Chief Justice S. C., D. C.

We accept the aforegoing bond as sufficient.

WEBB & WEBB,
For Defendants.

20 UNITED STATES OF AMERICA, *District of Columbia*, } *ss*:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a full and correct transcript of the record of all the proceedings had in said court in the matter of the estate of David D. Porter, deceased, as the same remains upon the files and records of said court.

Seal Supreme Court of the District of Columbia.

In testimony whereof I hereunto subscribe my name and affix the seal of said court, at the city of Washington, this 16th day of July, A. D. 1892.

J. R. YOUNG, *Clerk*.

21 *Writ of Error.*

UNITED STATES OF AMERICA, *ss*:

The President of the United States to the chief justice and justices of the supreme court of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said court, before you, in the matter of the estate of David D. Porter, deceased, the parties thereto being Georgeann Porter, Carlile P. Porter, Theodoric Porter, and Richard B. Porter, propounders of certain paper-writings purporting to be the last will and testament and codicil thereto of said David D. Porter, deceased, and Elizabeth Logan and Elena Campbell, mentioned in said paper-writings as Elena Porter, a manifest error hath happened, to the great damage of the said Elena Campbell, as by her complaint appears, and it being fit that the error, if any hath happened, should be duly corrected and full and speedy justice done in the matter aforesaid in this behalf: Therefore you are hereby commanded, if judgment be therein given, under your seal, distinctly and openly, to send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington within thirty days from the date hereof, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 22d day of June, in the year of our Lord 1892, and of the Independence of the United States the one hundred and sixteenth.

[Seal Supreme Court of the District of Columbia.]

J. R. YOUNG,
Clerk of the Supreme Court of the District of Columbia.

22 *Citation to the Supreme Court of the United States.*

The United States of America to Georgeann Porter, Carlile P. Porter, Theodoric Porter, Richard B. Porter, and Elizabeth Logan, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the District of Columbia, wherein Elena Campbell is plaintiff and you are defendant-, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected so that speedy justice be done the parties in that behalf.

Witness Edward F. Bingham, chief justice of the said supreme court of the District of Columbia, in the year of our Lord one thousand eight hundred and ninety-two.

June 22d, 1892.

E. F. BINGHAM,
Chief Justice.

On this — day of ——, in the year of our Lord one thousand eight hundred and —, personally appeared before me the subscriber, —— ——, and makes oath that he delivered a true copy of the above citation to —— ——.

—— ——.

We hereby acknowledge service of a copy of the above citation this 19th day of July, 1892.

WEBB & WEBB,
Att'ys for Def'ts in Error.

Endorsed on cover: Case No. 15,084. District of Columbia supreme court. Term No., 137. Elena Campbell, plaintiff in error, *vs.* Georgeann Porter, Carlile P. Porter, *et al.* Filed July 20th, 1892.

Office Supreme Court, U. S.
FILED.
DEC 12 1895
JAMES H. McKENNEY,
CLERK

IN RE Will of David D. Porter. Decided April 5, 1892.

The Chief Justice and Justices Cox and James sitting.

OPINION OF THE COURT.

Mr. Justice JAMES delivered the opinion of the Court:

The justice holding the special term for Orphans' Court business has certified to this court the question whether a certain paper writing, purporting to be a codicil to the will of the late Admiral Porter, should be admitted as a will disposing of real estate. The particular question is, whether that paper was *attested* by William Wilkes, one of the three persons whose names were subscribed as witnesses.

The proceedings in the Orphans' Court, relating to proof of the will and codicil, were as follows: Mrs. Edna Campbell, mentioned in those papers as Edna Porter, appeared by her solicitor and demanded full proof of their execution. Thereupon J. M. Alden, Chauncey Thomas and William Wilkes, who were offered as witnesses to the will, testified that, at or about the date thereof, they saw Admiral Porter sign and heard him acknowledge it as his last will and testament, and that thereupon, at his request, they subscribed their names as witnesses. As to the paper purporting to be a codicil, Alden and Thomas testified that, at or about the date thereof, they saw Admiral Porter sign it, and that thereupon, at his request, they signed their names to

it as witnesses, and that, when that paper was so signed, Wilkes, whose name appears as one of the witnesses, was not present. Wilkes testified that he was employed as a servant in the testator's house, that he was summoned by the bell to the room in which the Admiral transacted business; that when he entered it and, during his stay, the Admiral and J. M. Alden, and no other persons, were there; that, on his entrance, Admiral Porter pointed to a paper on the table and said "sign that paper;" that thereupon witness signed the paper pointed out to him and left the room; that the paper shown to him in court was the paper signed by him; that the signature, "William Wilkes, messenger," appearing thereon, was his handwriting; that, at the time of his signature, there was no acknowledgment of the nature of the paper, or of the signature of Admiral Porter, and that witness could not say whether such signature was then on the paper.

It was agreed in open court, by counsel for all of the parties, that the paper referred to had in fact been executed by Admiral Porter, and attested by the witnesses, J. M. Alden and Chauncey Thomas, before Wilkes signed it.

The statute of Maryland relating to wills, which is in force in this District, provides as follows:

"All devises and bequests of any lands or tenements, devisable by law, shall be in writing and signed by the party so devising the same, or by some other person in his presence and by his express direction, and shall be attested and subscribed, in the presence of the said testator, by three or more credible witnesses, or else they shall be utterly void and of none effect." Act of 1798, Ch. 101, subch. 1, section 4.

What is it that this statute requires to be attested? Is it the fact that the testator *signed* the paper in question; or is it the two facts that he not only signed that paper but

signed it as his will? In examining this question it is proper to refer as well to English as to American authorities, for the provision above cited was copied from section 5, of the statute of Charles II. Ch. 3, commonly known as the Statute of Frauds.

In Wyndham *vs.* Chetwynd, 1 J. Burr, 414 (1758) Lord Mansfield said: "This whole clause, which introduces a positive solemnity to be observed, not by the learned only, but by the unlearned; at a time when they are supposed to be without legal advice; in a matter which greatly interests every proprietor of land; where the direction should be plain to the meanest capacity; is so loose that there is not a single branch of the solemnity defined or described with sufficient accuracy to convey the same idea to the greatest capacity. There have been litigations and contradictory opinions, upon almost every part of the form; as, What is signing by the testator? Whether the witnesses are to attest *uno contextu*, *uno eodemque tempore?* Whether they are to see the testator sign? Whether they ought to know that he signs it as his will? Whether he ought to publish it as his will? A very little precision and a very few words might have prevented all these questions. * * * It has been said that this act of 29 C. 2, ch. 3, was drawn by Ld. Ch. J. Hale. But this is scarce probable. It was not passed till after his death; and it was brought in in the common way, and not upon any reference to the judges." These observations, especially that this section prescribed solemnities which must be practised by the unlearned, when they are supposed to be without legal advice, are strong arguments that it is not to be construed technically, nor in ways which only the after thought of litigation would suggest.

Later, in the same case, Lord Mansfield said: "The legislature meant only to guard against fraud by a solemn

it as witnesses, and that, when that paper was so signed, Wilkes, whose name appears as one of the witnesses, was not present. Wilkes testified that he was employed as a servant in the testator's house, that he was summoned by the bell to the room in which the Admiral transacted business; that when he entered it and, during his stay, the Admiral and J. M. Alden, and no other persons, were there; that, on his entrance, Admiral Porter pointed to a paper on the table and said "sign that paper;" that thereupon witness signed the paper pointed out to him and left the room; that the paper shown to him in court was the paper signed by him; that the signature, "William Wilkes, messenger," appearing thereon, was his handwriting; that, at the time of his signature, there was no acknowledgment of the nature of the paper, or of the signature of Admiral Porter, and that witness could not say whether such signature was then on the paper.

It was agreed in open court, by counsel for all of the parties, that the paper referred to had in fact been executed by Admiral Porter, and attested by the witnesses, J. M. Alden and Chauncey Thomas, before Wilkes signed it.

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Later, in the same case, Lord Mansfield said: "The legislature meant only to guard against fraud by a solemn

attestation, which they thought would soon be universally known, and might very easily be complied with. * * * Suppose the subscribing witnesses honest; how little need they know? They do not know the contents; they need not be together; they need not see the testator sign; (if he acknowledge *his hand* it is sufficient); *they need not know it to be a will; if he delivers it as a deed it is sufficient.*"

Bond *vs.* Seawell, 3 Burr, 1773 (A. D. 1765), was a case reserved at *nisi prius*, and the question was upon the due execution of the will of Sir Thomas Chitty. As to two of the witnesses, it was proved that the testator showed them the codicil and the last sheet of the will (the latter being written by him on two separate sheets); that he then sealed before them both this last sheet of the will and the codicil, took up both of them and delivered them severally *as his act and deed for the purposes therein mentioned.* A new trial was ordered on account of a question whether the first sheet of the will was, or was not, in the room at the time of the attestation. Meantime Lord Mansfield said: "It is not necessary that the witnesses should attest in the presence of each other, or *that the testator should declare the instrument he executed 'to be his will,'* or that the witnesses should attest every page, folio or sheet; *or that they should know the contents;* or that each folio, page or sheet should be particularly shown to them." In conclusion he said: "if the jury shall be of opinion that it (the first leaf of the will) was then in the room, they ought to find for the will generally; and they ought to presume, from the circumstances proved, that the will was in the room."

It is proper to remark that, in disposing of this case, Lord Mansfield informed the bar that he had had a conference with all of the judges, except Mr. Baron Adams, who was out of town. Although they only suggested certain

doubts, it is manifest that he had their concurrence in this view. This case is, therefore, of very weighty authority.

The case most commonly referred to by American courts is White *vs.* Trustees of British Museum, 6 Bing., 309. We shall state it somewhat at length, because it has been the subject of conflicting interpretations. That case was heard on a special verdict, which found that the paper in question was in the handwriting of the testator; that two of the witnesses signed it without seeing his signature, and were not informed by him of the nature of the paper, or of the purpose for which they were requested to sign it; that at a later date a third witness signed the paper, and was at the same time informed by the testator that it was his will.

Tindal, C. J., said: "It has been held, in so many cases, that it must now be taken to be settled law, that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same; but that any acknowledgment before the witnesses that it is his signature or any declaration that it is his will, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The objection, therefore, to the execution of the present will, does not rest upon the fact that it was signed by Mr. White in their presence; but that, with respect to two of the witnesses, there was no acknowledgment of his signature nor any declaration that it was his will, but that they signed their names in entire ignorance of the nature of the instrument or of the object for which their names were written.

* * *

"The question, however, appears to us to be: Whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in *words*, yet an acknowledgment in *fact*, by the devisor to the subscribing witnesses, that the instrument was his will? for if by what the

devisor has done, he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete. * * *

"In the execution of wills, as well as that of deeds, the maxim will hold good '*non quod dictum sed quod factum est inspicitur.*' Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question is the very paper writing which was produced by the testator to the three witnesses. * * * In the next place, it appears from the special verdict, that the devisor was conscious himself that the instrument was his will. For the verdict finds that he was of sound disposing mind, both at the time he signed it himself, and also at the time when the witnesses subscribed their names. But, further, it appears from the inspection of the instrument set out in the special verdict, the signature of the three names could not possibly inure to *charge* themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them *witnesses* to the will. And lastly, it appears from the same inspection, that immediately above the names of the witnesses, there was written in the handwriting of the testator, these words: 'In the presence of us as witnesses thereto,' which do amount to a clear and unequivocal indication of *the testator's intention that they should be witnesses to his will.*

"When, therefore, we find *the testator knew this instrument to be his will; that he produced it to the three persons and asked them to sign the same; that he intended them to sign it as witnesses; that they subscribed their names in his presence, and returned the same identical instrument to him, we think the testator did acknowledge in fact, though not in words, to the three witnesses that the will was his.* For, whatever might have been the doubt

upon the true construction of the statute, if the case were *res integra*, yet as the law is now fully settled, that the testator need not sign his name in the presence of the witnesses, but that *a bare acknowledgment of his handwriting is a sufficient signature* to make their attestation and subscription good within the statute; though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of the signing; we think the facts of the present case place the testator and the witnesses in the same situation as they stood where such oral acknowledgment of signature has been made, and we do, therefore, upon the principle of these decisions, hold the execution of the will in question to be good within the statute."

We have said that this opinion has been the subject of conflicting interpretations. It seems to have been understood by some courts to mean that the testator must, either in words or in effect, acknowledge, not only that the paper in question was his act, but that it was a *will*. Some expressions in it may, if considered separately, suggest such a meaning; for example, the following: "The question appears to us to be, whether, upon this special verdict, the finding of the jury establishes, although not an acknowledgment in words, yet an acknowledgment in fact, by the devisor to the subscribing witnesses, that the instrument was his *will*." But these words are not to be considered separately; they must be read with the context; and the concluding paragraph of the opinion was to the effect that an acknowledgment of what the testator knew to be his will was such an acknowledgment that it was his will as would satisfy the statute, although it gave no intimation to the witnesses of the nature of the instrument.

In Osborn *vs.* Cook, 11 Cushing, 532 (535) the Supreme Court of Massachusetts so interpreted White *vs.* The Trus-

tees. Thomas J., speaking for the court said: "In Ilott *vs.* Genge, 3 Curteis, 118, Sir Herbert Jeaner Fust, referring to the case of White *vs.* Trustees of British Museum, says: 'This is a determination that where a testator had written a will himself and signed it, and produces that will so signed (for that is a point not to be lost sight of) to witnesses and desires them to sign their names, that amounts to an acknowledgment that the paper signed by them *is his will*, and the instrument is complete for its purpose; it is acknowledged by the testator to be his will. It would be more correct to say, the instrument is acknowledged to be his *act*, which, upon production, is found to be his *will*.'" It may be added that the doctrine of White *vs.* The Trustees has been followed in Massachusetts. In Hogan *vs.* Grosvenor, 10 Metc., 54 (56), Hubbard, J., said: "His acknowledgment *that the instrument is his*, with a request that they attest it, is sufficient." This was said in a case where one of the witnesses had testified that he did not know what the paper was when he signed it at the testator's request, and only surmised that it was a will. The court observed that "The tendency of the later cases, both in England and this country, has been to give the words of the statute their simple meaning, that signing by witnesses, in the testator's presence, to *a paper acknowledged by him, in some satisfactory manner, to be his*, is a sufficient compliance with the terms of the statute."

In relation to the point in question, the statute of Connecticut is the same as the act of 29 Chas. II. The Supreme Court of that State said, in Canada's Appeal, 47 Conn., 450 (460): "The charge declares the law to be, that the signature of a testator to a will is not duly attested unless, at the time of attestation, the attesting witness knows that the instrument is a will. This attributes too much meaning to the word 'attestation;' more than has

been given to it by courts which have been called upon to define it where used in similar statutes." For a true interpretation of that word, the court referred to Wyndham *vs.* Chetwynd, *supra;* Wright *vs.* Wright, 7 Bing., 457; White *vs.* Trustees of British Museum, *supra*, and to Trimmer *vs.* Jackson, 4 Burn's Eccl. Law, 102, 3d Ed.; and remarked that in the latter case "the principle attained its *highest development.*" The attestation was there held sufficient, "although the devisor, not content with withholding the truth from the witnesses, concerning the contents or nature of the instrument executed, intentionally misled them by stating it to be a deed."

The facts in Welty *vs.* Welty, Exr., 8 Md., 15, did not raise the question whether the testator must acknowledge that the paper attested was a will, but we understand the reference of the court to the cases above cited to express approval.

This line of cases fully justifies the propriety of some general observations of Lord Mansfield in Wyndham *vs.* Chetwynd. After stating that the legislature meant only to guard against fraud, and that, in his experience, "many more fair wills have been overturned for want of the form, than fraudulent have been prevented by introducing it," he said: "For these and many more reasons, it is clear that judges should lean against objections to the formality. They have always done so, in every construction upon the words of the statute; *a fortiori* ought they to do so if that system would spread a snare, in which many honest wills must be entangled, and be no preservative against fraud."

We accept as authoritative the line of cases which we have cited. They show that, within the meaning of the statute of 29 Charles II, attestation is properly made, either when the witness has seen the testator sign the instrument, or has heard him, after it has been signed, acknowledge

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been given to it by courts which have been called upon to define it where used in similar statutes." For a true interpretation of that word, the court refered to Wyndham *vs.* Chetwynd, *supra;* Wright *vs.* Wright, 7 Bing., 457; White *vs.* Trustees of British Museum, *supra*, and to Trimmer *vs.* Jackson, 4 Burn's Eccl. Law, 102, 3d Ed.; and remarked that in the latter case "the principle attained its *highest development.*" The attestation was there held sufficient, "although the devisor, not content with withholding the truth from the witnesses, concerning the contents or nature of the instrument executed, intentionally misled them by stating it to be a deed."

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We accept as authoritative the line of cases which we have cited. They show that, within the meaning of the statute of 29 Charles II, attestation is properly made, either when the witness has seen the testator sign the instrument, or has heard him, after it has been signed, acknowledge

that the act was his. They show also that this acknowledgment may be conveyed either by words or by acts which indicate to the witness that he is called upon to act in the capacity of witness, and to attest something which is treated by the testator as his act. They show, too, that it is not necessary to the effectiveness of this acknowledgment or of the attestation, that the witness should know the nature of the instrument produced and submitted for his attestation. It is pointed out by Chief Justice Tindal, as a significant circumstance, that the paper laid before the witness in White *vs.* The Trustees bore the testator's signature and the formula of attestation. The significance of this fact was, not that the witness was thereby enabled to know what kind of instrument he was to attest, but that such fact was consistent only with an intent, on the testator's part, to acknowledge to the witness what he had done.

All of the essential facts commented upon by Chief Justice Tindal in that case appear in the case before us. The testator laid before the witness, Wilkes, a paper bearing his own signature and the word "witnesses." This could have but one meaning. He thereby conveyed an acknowledgment that the instrument produced was his act, and along with this acknowledgment, a desire that the witness should be witness to that fact. We are of opinion that the transaction before us complied with every requirement stated in White *vs.* The Trustees of the British Museum, and therefore was a compliance with the Statute of 29 Charles II, Ch. 3.

We hold that the codicil in question was properly executed and attested as a will devising real property.

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 147.

ELENA CAMPBELL, PLAINTIFF IN ERROR,

vs.

GEORGEANN PORTER, CARLILE P. PORTER, ET AL., DEFENDANTS IN ERROR.

STIPULATION.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
Attorneys for Plaintiff in Error.
CHAPIN BROWN,
Attorney for Defendants in Error.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

No. 137.

ELENA CAMPBELL, PLAINTIFF IN ERROR,

vs.

GEORGEANN PORTER, CARLILE P. PORTER, ET AL., DEFENDANTS IN ERROR.

STIPULATION.

It is hereby stipulated and agreed this 18th day of October, 1895, that the clerk of the supreme court of the District of Columbia cause to be made lithographic copies of the will of David D. Porter, deceased; also lithographic copies of the alleged codicil to his will, filed in his office, and certify the same to the Supreme Court of the United States, and that such copies so certified be deemed a part of the transcript of the record in the above-entitled cause for the purpose of showing the exact position of the signatures attached to each of said papers.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
Attorneys for Plaintiff in Error.
CHAPIN BROWN,
Attorney for Defendants in Error.

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a true lithographic copy of the will of David D. Porter, deceased, on file in the office of the register of wills, which I have caused to be made and certified to the Supreme Court of the United States, pursuant to the stipulation, dated the 18th of October, 1895, and filed in this court.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at the city of Washington, this 10th day of December, 1895.

[SEAL.] JOHN R. YOUNG, *Clerk.*

UNITED STATES OF AMERICA, }
District of Columbia, } ss:

I, John R. Young, clerk of the supreme court of the District of Columbia, do hereby certify the foregoing to be a true lithographic copy of the alleged codicil to the will of David D. Porter, deceased, on file in the office of the register of wills, which I have caused to be made and certified to the Supreme Court of the United States, pursuant to the annexed stipulation, dated the 18th of October, 1895.

In testimony whereof I hereto subscribe my name and affix the seal of said court, at the city of Washington, this 10th day of December, 1895.

[SEAL.] JOHN R. YOUNG, *Clerk.*

[Endorsed:] Case No. 15,084. Supreme Court U. S., October term, 1895. Term No., 137. Elena Campbell, pl'ff in error, *vs.* Georgeann Porter, *et al.* Stipulation and addition to record. Filed Dec. 10, 1895.

FILED
DEC 12 1895
JAMES H. McKENNEY,
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

ELENA CAMPBELL,
PLAINTIFF IN ERROR,

v.

GEORGEANN PORTER, CARLILE P. PORTER ET AL.,
DEFENDANTS IN ERROR.

No. 137.

BRIEF FOR PLAINTIFF IN ERROR.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
* *For Plaintiff in Error.*

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

ELENA CAMPBELL,
PLAINTIFF IN ERROR,
v.
GEORGEANN PORTER, CARLILE P. PORTER ET AL.,
DEFENDANTS IN ERROR.

No. 137.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

On the 12th day of November, 1889, David D. Porter, an admiral in the U. S. Navy, made a will giving all his property, real and personal, to his wife for life, and at her death to be equally divided among his five children and the children of a sixth child (R. 8).

On or about the 4th day of June, 1890, *more than six months after making his will*, Admiral Porter signed a paper-writing on a separate piece of paper and not attached to the will, alleged to be a codicil, in which it is provided that should his daughter Elena Porter (now Elena Campbell, the plaintiff in error) marry and have heirs, then her

share of the estate should at her death "descend" to such heirs, but if she should die leaving no children, then her share should "descend" to certain other persons named in the paper (R. 9).

Admiral Porter died in the city of Washington on the 13th of February, 1891, and on the 6th of March, 1891, the executors named in the will filed a petition in the Supreme Court of the District of Columbia, praying that letters testamentary be granted to them (R. 2).

The petition came on for hearing before the court holding a special term for probate court business, on the 6th of March, 1891, and thereupon said will was duly proved and admitted to probate as a will competent to pass both real and personal property. The codicil was also admitted to probate *in respect to personal property*, but the court made an order that the question as to the sufficiency of the codicil *to devise or dispose of real estate* be certified to the court in general term for hearing in the first instance upon the evidence set out in the order (R. 10, 11).

In April, 1892, the hearing was had at general term as to the sufficiency of the codicil to dispose of real estate upon the evidence certified from the special term. At this hearing Elena Campbell, by her counsel, objected that the codicil ought not to be admitted to probate as a devise of real estate, for the reason that the evidence certified did not show that the codicil was attested and subscribed by three witnesses, as required by law, but that in respect of one of the witnesses, William Wilkes, the testator neither signed in the presence of such witness nor acknowledged his signature or the nature of the instrument to such witness, so that the said witness attested nothing, and for other reasons apparent upon the face of the order; but the objections were overruled, and it was adjudged that the

codicil was sufficient as a devise of real estate, and that it was duly executed by the testator and subscribed and attested by three witnesses, as required by law, and that it be admitted to probate as a devise of real estate (R. 11). The judgment of the court is set out at R. 7, bottom of the page.

At the trial a bill of exceptions was prayed and allowed (R. 11), setting out the evidence and proceedings at the trial, and the intermarriage of Elena Porter, and certifying that the difference in value of the real estate as devised by the last will and testament in fee simple and as restricted by the codicil exceeded the sum of five thousand dollars (R. 8-12).

To reverse the judgment of the court in general term this writ of error was sued out (R. 13).

Assignment of Errors.

The court erred—

1. In overruling the objections of the plaintiff in error to admitting the said paper-writing to probate as a devise of real estate.

2. In adjudging that upon the facts set out in the order of the special term the said paper-writing was duly executed by the testator and attested and subscribed by three witnesses as required by law.

3. In admitting said paper-writing to probate as a devise of real estate.

Points and Argument.

The evidence set out in the order of the special term *was all the evidence in the case* (see order of Mr. Justice Bradley, R. 11); and upon the said evidence the judgment

was rendered (R. 11); and see also the judgment (R. 7, bottom of page).

The Maryland act relating to the execution of wills of real property, in force in this District, is as follows:

"All devises and bequests of any lands or tenements, devisable by law, shall be in writing, and *signed* by the party so devising the same, or by some other person in his presence, and by his express directions, and shall be *attested and subscribed*, in the presence of the said devisor, by three or four credible witnesses, or else they shall be utterly void and of none effect."

2 Kitty's Laws of Md., act of 1798, ch. 101, sub. ch. 1, sect. 4.

The above provision was copied *verbatim* from the Statute of Frauds (29 Charles II, ch. 3, sect. 5), which remained the law of England until 1838, when the Statute of Wills (1 Vict., ch. 26) was passed. Although the laws of Maryland were codified in 1860 and again in 1878, no change was made in the above section of the act of 1798, but it was re-enacted in precisely the same words, and is now the law of that State.

The words of the statute require that a devise of real estate shall be "signed" by the testator, and "attested and subscribed" by at least three witnesses in his presence. It having been settled by judicial authority in the construction of the Statute of Frauds that the witnesses need not be together when attesting and subscribing, but might attest and subscribe separately, it followed as a necessary consequence that the acknowledgment of the will might take the place of signing, for, as was said by Lord Hardwicke in the leading case of Ellis *v.* Smith (1 Ves., Jr., 11), if the testator signed three times there would be three executions and none of them good. The substitution of acknowledgment for signing was, however, made with reluctance (see the

above case) and certainly was not intended to weaken the force of the statute, or to impair the standard of certainty established by it. It is and always has been necessary to establish the fact of acknowledgment with as much certainty as would be necessary in respect of signing if the latter method of execution had been adopted instead of the former.

Whatever the medium of proof, whether signing or acknowledgment, the end of proof—that is, the fact that a paper-writing alleged to be a will was the act of the testator, *adopted as such whether by signing or acknowledgment in the presence of three witnesses* must be clearly and definitely established.

The facts: These are few and simple. The will was executed on the 12th of November, 1889; the alleged codicil, a separate paper not attached to the will, was signed by the testator on or about the 4th of January, 1890, more than six months after the execution of the will (R. 9, 10, 5). The contention of the defendants in error is that the alleged codicil was signed by the testator in the presence of two witnesses, Alden and Thomas, and by them attested and subscribed, and acknowledged by the testator in the presence of Wilkes, and by him attested and subscribed.

The only evidence in the cause is that of Alden and Thomas and Wilkes (R. 10).

The two former, whose names are signed under the word "Witnesses," testify that at or about the date of the alleged codicil they saw the testator sign the same, and thereupon, at his request, subscribed their names to the paper as witnesses (R. 10). They further say that when such execution and attestation took place Wilkes was not in the room (R. 10).

After the alleged codicil had been executed by Porter and attested by the two witnesses, Wilkes entered the room.

His testimony is the only evidence touching the acknowledgment of the testator. Alden and Thomas are both absolutely silent as to what passed after Wilkes entered the room. Indeed, according to the evidence of Wilkes, Thomas had left the room before Wilkes entered it. He says that he was a servant in the house of Porter, and, being summoned by the bell to attend the room, being the office where Porter transacted business, he "entered the room, and during his stay David D. Porter and J. M. Alden were there, but no one else; that when the witness entered the room the said David D. Porter pointed to a paper on the table and said, "sign that paper;" that thereupon the witness signed the paper and left the room; that the paper so signed is the same now shown him; that there was no acknowledgment of the nature of the paper, nor of the signature of the said David D. Porter, nor can the witness say whether the said signature was then upon the paper or not" (R. 10).

This is the whole evidence in respect of acknowledgment. It comprised a single act of Porter, that is, pointing to a paper on the table, and a single utterance—"sign that paper"—and this act and this utterance were addressed to a servant in the employment of the testator.

The question before the court is thus reduced to the proposition whether a direction to a servant to sign a paper pointed out, but without the slightest allusion to the paper as the *act* much less the will of Porter, or to any relation on the part of Porter to the paper, or to what, if any, relation Wilkes bore or was to bear to the paper, constitutes an acknowledgment of a will, and the legal equivalent of signing in the presence of a witness.

There is filed with the record a lithographic copy of the alleged codicil. It is not in the handwriting of Porter, but his name is annexed to it, and to the left will be found

the word "Witnesses," and underneath it the signatures of Alden and Thomas.

The evidence shows no word or act on the part of the testator giving credit or character to the paper in any respect, and much less accrediting it as the act of the testator to be witnessed by Wilkes.

The direction was, "sign that paper," not to read it, and whilst the testator pointed to the paper lying on the table as the thing to be signed, he did not direct it to be signed under the word "Witnesses," nor did he say or do anything from which it could be inferred that he intended to make known to Wilkes that the paper was his act to be witnessed by Wilkes.

The contention below was, and it will doubtless be repeated here, that the insufficient acknowledgment by Porter might be eked out by what Wilkes might have discovered for himself from the paper. This, it is submitted, is a mistake, as the question is one of acknowledgment by the testator to Wilkes. The question is not what the character of the paper was, but whether Porter declared it to be his act to Wilkes; not even what the intention of Porter was, but whether such intention was manifested as required by law.

It will be observed that Wilkes was in the room only long enough to sign the paper, and that he cannot say whether, when he signed the paper, the name of the testator was on it or not, and that he did not sign under the word "Witnesses," although there was plenty of room, but did sign under the name of the testator.

So much for the evidence as to acknowledgment. As to the evidence of the attestation of Wilkes, it is confined to the passage quoted above as to acknowledgment. Presumably he has said all that could be said on both subjects, especially as Alden, who continued in the room, and was there when Wilkes signed, is silent.

It is plain that Wilkes in signing simply obeyed the command of his master; that he knew he was directed to sign a paper, and hence did so, and knew nothing more; that, as he was not told so, he did not know anything as to the nature of the paper, or whose act it was, whether of his master or somebody else, or, indeed, whether it was an act at all of anybody; that, as he was not told so, he did not know there was anything to be witnessed, and that in signing his name he did not know he was acting as a witness or intend to act as such.

The defendants in error, it will be borne in mind, were the propounders of the alleged codicil, and the *onus probandi* was upon them.

It is important to note that there is no evidence, except what may appear from the paper itself, that Porter *knew* the paper was a codicil or will when he directed Wilkes to sign it, or at any time before or afterwards.

In many of the cases it is held that such knowledge must exist irrespective of the paper, and especially where, as here, the paper is not in the handwriting of the testator.

The following propositions of law are submitted:

First. That where acknowledgment is adopted in the place of signing before witnesses, the acknowledgment must declare to the witnesses, by words or acts sufficiently definite, that the paper-writing is the will of the testator, and to be witnessed as such, and it must affirmatively appear that he knew the paper-writing to be his will.

Second. That the witnesses must not only subscribe, but they must attest, and in token of such attestation subscribe their names as witnesses *animo attestandi*.

As to the first.

Mr. Greenleaf says:

"Nor is it deemed necessary that the witnesses should actually *see* the testator sign his name. The statute does

not in terms require this, but only directs that the will be 'attested and subscribed in the presence of the testator by three or four credible witnesses.' They are witnesses of the entire transaction, and, therefore, it is held that an acknowledgment of the instrument by the testator in the presence of witnesses whom he requests to attest it will suffice, and that this acknowledgment need not be made simultaneously to all the witnesses, but is sufficient if made separately to each one and at different times. Nor is it necessary that the acknowledgment be made in express terms; it may be implied from circumstances, such as requesting the persons to *sign their names as witnesses*. But in such cases it must appear that the instrument had previously been signed by the testator."

2 Green. Ev., sect. 676.
Also 1 Jarman on Wills (5th Am. from 4th Eng. ed.) 212, &c., and notes.
Williams on Exrs., 6th Am. ed. 112–119, and notes.

In *Chase* v. *Kittredge* (11 Allen, 49), decided in 1865, Gray, J., rendering the unanimous decision of the court, after stating that the provision of the Massachusetts statute is substantially identical with Stat. 29, Car II, c. 3, Sect. 5, says:

"This provision, it will be observed, does not expressly require that the testator should sign in the presence of the witnesses; nor that the witnesses should subscribe in the presence of each other, nor even that they should know that the instrument is a will. Courts will not require formalities which the statute does not. It is accordingly the well-settled construction, *both in England* and in this commonwealth, that it is sufficient for the testator *in any form of words to acknowledge or recognize his signature in the presence of the witnesses, either together or separately*, with no attestation clause beyond the single word 'witnesses,' and without their knowing what the instrument is.

"The statute requires that the will 'shall be in writing and subscribed by the testator,' and shall be 'attested and

subscribed in the presence of the testator by three or more competent witnesses.' He is not required to write his signature in their presence, *but it is his will which they are to attest and subscribe.* It must be his will in writing, *though he need not declare it to be such.* It must therefore be signed by him before it can be attested by the witnesses. *He must either sign in their presence or acknowledge his signature to them before they can attest it.* The statute not only requires them to attest but to subscribe. It is not sufficient for the witnesses to be called upon to witness the testator's signature, or to stand by while he makes or acknowledges it, and be prepared to testify afterwards to his sanity and due execution of the instrument, but they must subscribe. *This subscription is the evidence of their previous attestation*, and to preserve the proof of that attestation in case of their death or absence, when after the testator's death the will shall be presented for probate. *It is as difficult to see how they can subscribe in proof of their attestation before they have attested*, as it is to see how they can attest before the signature of the testator has made it his written will."

In *Willis* v. *Mott* (36 N. Y. 486) a portion of the above-recited language of Gray, J., is quoted approvingly.

The New York revised statutes require that every will shall be subscribed by the testator at the end of the will; such subscription shall be made by the testator in the presence of each of the attesting witnesses, *or shall be acknowledged by him to have been so made to each of the attesting witnesses.* The testator at the time of making such subscription, or at the time of acknowledging the same, shall declare the instrument so subscribed to be his last will and testament.

2 N. Y. Rev. Stat., p. 63, sects. 40, 41.

Many of the States of the Union have passed similar statutes.

These provisions were incorporated in the N. Y. revised

statutes in 1830. *Lewis* v. *Lewis* (11 N. Y. 220) was decided under them. In this case the probate of a will was objected to, among other reasons, because *the subscription was not made or acknowledged by the decedent in the presence of the attesting witnesses.* The court say:

"The formalities prescribed by statute must be observed and the attesting witnesses must be informed at the time and by the testator, or in his presence and with his assent, and *have knowledge* of all the facts necessary to a due execution and publication of the will, and to which they are called to attest. If the party does not subscribe in their presence, *then the signature must be shown to them and identified and recognized by the party, and in some apt and proper manner acknowledged by him as his signature.* The statute is explicit and will not be satisfied with anything short of a substantial compliance with its terms."

In *Baskin* v. *Baskin* (36 N. Y. 416), decided under the same provisions of the N. Y. revised statutes, the court say:

"The *subscription* and *publication* of a testamentary instrument are independent facts, each of which is essential to its complete execution.

"When, however, the testator produces a paper to which he has personally affixed his signature, requests the witnesses to *attest* it, *and declares it to be his last will and testament*, he does all that the law requires. It is enough that he verifies the subscription as authentic, without reference to the form in which the acknowledgment is made, and there could be no more unequivocal acknowledgment of a signature thus affixed than presenting it to the witnesses *for attestation and publishing the paper so subscribed as his will.*"

Before the above-recited provisions were incorporated in the New York revised statutes, the law of that State in reference to the execution of wills of real estate was the

same in substance as the provision in the Statute of Frauds (29 Chas. II, chap. 3.) *Jauncey* v. *Thorne* (2 Barb. Ch. 40, S. C. Redfield's Am. Cas. on Wills, 655) was a case decided *under the Statute of Frauds*. In this case Walworth, ch., after stating that the will in question was made and the testator died *previous to the revised statutes*, and that the formalities required to its due execution were those required by the act of 1813 concerning wills, *which were the same in substance as the provision of the statute 29th Charles II, chap.* 3, says: "The language of the act [of 1813] is that 'every such last will and testament shall be in writing, and signed by the party making the same, or by some person in his presence, and by his express direction; and shall be attested and subscribed in the presence of such party by three or more credible witnesses, or such last will and testament shall be utterly void." (1 R. L., 1813, p. 364, sec. 2.)

The chancellor then uses the following language:

"Surely the attesting witnesses should see the testator, or some one for him, sign the instrument which they are called upon to witness; or the testator should either say or do something in their presence or hearing *indicating that he intends to recognize such instrument or paper as one which has been signed by him as a valid will*, or as having been signed by his authority for the purposes therein expressed. At the same time, I do not deem it necessary that the testator should in terms declare that his name, signed to the will, was so signed by him, or that it was so signed by his authority and direction, and in his presence. But the production of the will *with his name subscribed to it*, and in such a way that the signature could be seen by the attesting witnesses, *and the request of the testator that they should witness the execution of the instrument by him, or as his will*, would of itself be a sufficient acknowledgment of his signature to render the will valid, under the provisions of the act which was in force when this will was made."

In *Osborn* v. *Cook* (11 Cushing, 532), decided in 1853, the paper offered for probate purported *upon its face* to be a will, *and was wholly in the testator's handwriting;* there was no attestation clause, except the single word "witness" preceding the signatures of the witnesses; the testator signed this instrument in the presence of two of the witnesses, *and pointed out his signature to the third witness;* and each of the witnesses signed it *as a witness*, in the presence of the testator, and at his request. But the testator did not declare to either of the witnesses that it was his will, nor did either of them know or suspect the nature of the instrument. *The case was submitted to the court upon these facts.* THOMAS, J., delivering the opinion of the court, says:

"This will was in writing, signed by the testator, and subscribed in his presence by three competent witnesses. *It was written by the testator.* He knew, therefore, if of sound mind, what he signed and *what he asked the witnesses to attest.* The calling upon witnesses to *attest his execution of an instrument*, whose character and contents he *well knew*, was in effect a declaration that the instrument he had signed, and his signature which he desired them to attest, *was his act*, though the character and contents of the instrument were not disclosed to them.

"No formal publication of the instrument, no declaration of its contents or of its nature, is in terms required.

"In the case of *Wyndham* v. *Chetwynd* (1 Burr. 421) Lord Mansfield says: 'Suppose the witnesses honest, how little need they know; they do not know the contents; they need not be together; they need not see the testator sign (*if he acknowledges his hand it is sufficient*); they need not know it is a will (if he delivers it as a deed it is sufficient).'

"In the more recent case of *White* v. *The Trustees of the British Museum* (6 Bing. 310) it was held that a will was sufficiently attested when subscribed by three *witnesses* in the presence and at the request of the testator, although none of the witnesses saw the testator's signature, and only

one of them knew what the instrument was. Chief Justice Tindall treats the law as fully settled *that a bare acknowledgment by the testator of his handwriting* is sufficient to make the attestation and subscription of the witnesses good within the statute, although such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument or the object of signing." See also Wright *v.* Wright, 7 *id.* 457; Johnson *v.* Johnson, 1 Cromp. & M. 140.

"The more recent cases, *Dewey* v. *Dewey* (1 Met. 349) and *Hogan* v. *Grosvenor* (10 *id.* 54), recognize and adopt the principles stated in the case of *White* v. *Trustees of British Museum, supra*. In Hogan *v.* Grosvenor, *supra*, Hubbard, J., said: 'We consider the law as settled that the testator need not execute the instrument in the presence of the witnesses; that they need not sign in the presence of each other; and that all which is required is, that the testator shall see their attestation, or be in a situation where he can see it. *His acknowledgment that the instrument is his, with a request that they attest it, is sufficient.*'

"The doctrine of these cases covers the ground of this. If any declaration is necessary, it requires no set form of speech, indeed no words; it may be done by acts as well as words. *Non quod dictum, sed quod factum est, inspicitur.* And the presentation of the intrument, *written by the testator himself*, and bearing his signature, to the witnesses, *with a request for them to attest it*, was sufficient."

We have thus quoted with much fullness from the opinion in *Osborn* v. *Cook* because the opinion of the court below in the case at bar is based upon it, and the authorities cited in it. Yet, if that case be adopted as a true exposition of the law, it is clear that the paper in question was not properly executed as a will of real estate.

White v. *The Trustees of the British Museum*, *supra*, and *Wright* v. *Wright*, *supra*, are the cases upon which the defendants in error mainly rely. As the last case is merely a reaffirmance of the doctrine of the first, it requires no comment.

In regard to the first case, *it lays down the general principle for which we are contending.* It declares that if the testator does not sign in the presence of the three witnesses, he must acknowledge before the witnesses that it is his signature, *or make some declaration before them that it is his will.* But there are strong points of difference *as to the facts* between it and the case at bar. In the English case it was found by the special verdict that *the whole of the paper-writing*, except the names of the witnesses, was *in the handwriting of the testator*, and that at the time the last witness signed, the testator informed him that the paper was *his will;* and it appeared from the inspection of the paper that *immediately above* the names of the witnesses there was written *in the hands of the testator* these words: "In the presence of us as witnesses thereto." In rendering the judgment of the court, Tindal, C. J., says:

"Upon this *special verdict* the question is whether, in the execution of this will, the several requisites contained in the Statute of Frauds have been duly observed. And as the special verdict finds that *the whole of the paper-writing is in the handwriting of W. White*, and that he signed it before it was signed by the witnesses, the jurors do find in terms that there is a devise in writing, and that it is signed by the party who makes the devise.

"It has been held in so many cases that it must now be taken as settled law that it is unnecessary for the testator actually to sign the will in the presence of the three witnesses who subscribe the same, but that *any acknowledgment before the witnesses that it is his signature, or any declaration before them that it is his will*, is equivalent to an actual signature in their presence, and makes the attestation and subscription of the witnesses complete. The case of *Ellis* v. *Smith*, which was decided by Lord Chancellor Hardwicke, assisted by the Master of the Rolls, Sir J. Strange, Lord Chief Justice Willis, and Lord Chief Baron Parker, all persons of high and eminent authority, is express to the latter point.

"The objection, therefore, to the execution of the present will does not rest upon the fact that it was not signed by W. White (the testator) in their presence; but that with respect to two of the witnesses, Hounslow and Bristow, there was no acknowledgment of his signature, nor any declaration that it was his will, but that they signed their names in entire ignorance of the nature of the instrument, or of the object for which their names were written. And it is argued that if such subscription of their names satisfies the intention of the statute, the word *attested* will have no force whatever and may be considered as if it had never been inserted.

"The question, however, appears to us to be, whether, *upon this special verdict*, the finding of the jury establishes, although not an acknowledgment in *words*, yet an acknowledgment in *fact*, by the devisor to the subscribing witnesses that this instrument was his will, for if by what the devisor has done he must, in common understanding and reasonable construction, be taken to have acknowledged the instrument to be his will, we think the attestation of the will must be considered as complete, and that this case falls within the principle and authority of that of Ellis *v.* Smith.

"In the execution of wills, as well as that of deeds, the maxim will hold good, '*non quod dictum sed quod factum est, inspicitur.*'

"Now, in the first place, there is no doubt upon the identity of the instrument. The paper in question is the very paper-writing which was produced by the testator to the three witnesses. The great object of the direction of the statute, that witnesses shall subscribe in the presence of the devisor, was to prevent the possibility of the witnesses returning to his hands any other instrument than the very instrument which he delivered to them to attest. This object has been attained in the present case, and the identity of the instrument is beyond dispute.

"In the next place, if appears from the special verdict that the devisor was conscious himself that the instrument was his will. For the verdict finds that he was of sound and disposing mind, both at the time he signed it himself,

and also at the time when the witnesses subscribed their names.

"But, further, it appears from the inspection of the instrument set out in the special verdict that the signature of the three names could not possibly enure to charge themselves, or any other person, and could not have been done for any other purpose whatever than simply to make them witnesses to the will. And, lastly, it appears from the same inspection *that immediately above the names of the witnesses there was* written *in the handwriting of the testator* these words: 'In the presence of us as witnesses thereto,' which do amount to a clear and unequivocal *indication* of the testator's *intention* that they should be witnesses to his will.

"When, therefore, *we find the testator knew this instrument to be his will;* that he produced it to the three persons and asked them to sign the same; *that he intended them to sign as witnesses;* that they subscribed their names in his presence, and returned the same identical instrument to him, we think the testator did acknowledge, in fact though not in words, to the three witnesses that the will was his. For whatever might have been the doubt upon the true construction of the statute, if the case were *res integra*, yet, as the law is now fully settled that the testator need not sign his name in the presence of the witnesses, but that *a bare acknowledgment of his handwriting is a sufficient signature* to make their attestation and subscription good within the statute, though such acknowledgment conveys no intimation whatever, or means of knowledge, either of the nature of the instrument, or the object of signing, we think *the facts of the present case* place the testator and the witnesses *in the same situation as they stood where such oral acknowledgment of signature has been made*, and we do therefore, upon the principle of these decisions, hold the execution of the will in question to be good within the statute."

No lawyer can read and analyze the above-quoted decision in White *v.* The Trustees of the British Museum without being impressed with the belief that the turning point in

that case was the fact that the whole of the will, *including the words immediately above the names of the witnesses*, "In the presence of us as witnesses thereto," was *in the handwriting of the testator*, and the three persons signed their names, at his request, and put their names *under these words*. This fact enabled the court to find that the testator knew the instrument to be his will, *and that he intended the three persons to sign it as witnesses*. It was the attestation clause, *in the handwriting of the testator, immediately above the three names*, which were signed at the testator's request, which, in the language of the decision, "*amounted to a clear and unequivocal indication of the testator's intention that they should be witnesses to his will.*" This was equivalent to "*oral acknowledgment of signature.*" The will, being in the testator's handwriting, showed that he *knew* it was his will; the words "In the presence of us as witnesses thereto" *being also in his handwriting*, showed that he *intended* the persons who, at his request, signed their names to the instrument, and who put them *under these words*, to sign as witnesses, and amounted to a *declaration* to the three persons that it was his will. This evidence enabled the court to find that the testator *acknowledged* in *fact*, though not in *words*, that the will was his.

In the case at bar neither the codicil nor the word "Witnesses" is in the handwriting of Porter. *Wilkes did not sign under the word "Witnesses."* Porter never acknowledged his signature or the nature of the instrument to Wilkes, nor did Wilkes see the signature of Porter on the paper. He never requested Wilkes to sign the paper *as a witness*, or to *attest* or *witness* it, or the signature to it. He merely said, "sign that paper," and there is no evidence that Wilkes ever knew or had reason to know that the paper was a will or codicil or the act of Porter, or that he signed it *as a witness* or *attested* it, or the object of his signing it,

and, above all, there is no evidence that Porter *intended* him to sign *as a witness*.

In *Osborn* v. *Cook*, *supra*, the opinion of the court concludes as follows:

"The presentation of the instrument, *written by the testator himself* and bearing his signature, to the witnesses, with a request for them to *attest* it, was sufficient."

In that case the will was *wholly in the testator's handwriting*, including, of course, the word "witnesses" *preceding the signatures of the witnesses*, the testator signed the instrument in the presence of two of the witnesses, *and pointed out his signature to the third witness*, and each of the witnesses signed it *as a witness* in the presence of the testator and at his request. *These facts* brought the case within the principle of the opinion in White *v.* The Trustees of the British Museum, and the will was admitted to probate.

In the case at bar Wilkes was not requested by *words* or *acts* to *attest* the paper. A bare direction to *sign* the paper was not a request to *attest* or *witness* it, or the signature to it.

Referring again to *White* v. *The Trustees of the British Museum*, and *Wright* v. *Wright*, it may be proper to state that these two cases have been followed by some of the English courts in so far as they declare the doctrine that if the testator does not sign the paper in the presence of the witnesses, he must acknowledge before them that it is his signature, or make some declaration before them that it is his act or will which they are called upon to attest, but this acknowledgment or declaration may be made by *acts* as well as *words;* and it is not necessary that the acknowledgment should convey to the witnesses any intimation, or means of knowledge, either of the nature of the instrument, or the

object of signing. Still the *acknowledgment* must be made *in some form.* Beyond this these two cases establish nothing except that under the *peculiar facts* of those cases the attestation of the will was good.

Now the question in the case at bar is simply this: Is the bare direction by a master to his servant to *sign* a paper which had already been executed by the master such an *act* as amounts to a request to the servant to *attest or witness an act of the master;* or does such a direction amount to an *acknowledgment* by the master that the will, or the signature, is his, where there is no attestation clause on the paper except the word "Witnesses," and the servant, pursuant to the direction, signs the paper, but *not* under the word "Witnesses," and did not know at the time he signed it whether the signature of the master was then upon the paper or not, and where there is *no proof* that the servant *knew*, before or at the time he signed his name, what was the nature of the paper, or his object in signing it, or that he was signing *as a witness*, or that he was called upon to attest or witness an act of the master, and where there is *uncontradicted proof* that "there was no acknowledgment of the nature of the paper nor of the signature" of the master (R. 10, 11 ?

If such an *act* is decided to be an acknowledgment by the master, then the word "attested" will be virtually eliminated from the statute.

Even if Wilkes, when requested to sign the paper, had placed his name under the word "Witnesses," there would still have been no attestation, in the absence of proof of a *declaration* of intention by Porter to Wilkes that he should sign *as a witness.*

Hogan v. *Grosvenor* (10 Metcalf, 54) is a case relied on by the defendants in error, and it is cited in the opinion of the court below in support of its judgment, but we regard

the case as most favorable to the plaintiff in error. The will was *in the handwriting of the testator*, and the attestation clause was in these words: "signed, sealed, published, and declared by the above-named Ethan Button to be his last will and testament," &c., and the testator asked the witness to sign the instrument, and *pointed out the place* under the attestation clause where he wished the witness to put his name, and the witness signed as requested, but he did not know what the paper was, and did not notice the signature of the testator or of the previous witness; he saw writing but could not tell what it was. The court say:

"We think, *from this pointing out the place under the words written*, the jury might rightfully have inferred a publication of the paper as his will, as well as a request to sign it. The words of the statute require no particular form of expression, nor declaration of the testator, but an *attestation* and subscription of the witnesses in the presence of the testator. The decisions have been various; but we consider the law as settled, that the testator need not execute the instrument in the presence of the witnesses; that they need not sign in the presence of each other, and that all which is required is that the testator shall see their *attestation*, or be in a situation where he can see it. *His acknowledgment that the instrument is his, with a request that they attest it*, is sufficient.

"The tendency of the later cases, both in England and this country, has been to give the words of the statute their simple meaning; that a signing by the witnesses, in the testator's presence, to a paper *acknowledged by him, in some satisfactory manner, to be his*, is a sufficient compliance with the terms of the statute. It meets its provisions; it identifies the paper executed; it shows it to be his. And as to its contents, the witnesses are not called upon to know them; nor is it necessary they should, in order to judge of his capacity to execute the paper. The request to sign is evidence, among other things, of a disposing mind, if there is no incapacity. And in the present case the testator

wrote the will *with his own hand* and requested all the witnesses to *attest* his signature; to two of them he declared, in terms, that it was his will; and to the other he at least *pointed out the place where he should put his signature, at which place his intention was made known, if the witness chose to read what he was called to attest to.* He was in a situation to know the nature of the instrument, and his surmising that it was a will may be the imperfect recollection of what was then communicated to him.

"It was argued in this case that *acts equivalent to an acknowledgment* are open to all the mischiefs intended to be prevented by requiring the solemn attestation of wills. But if they are so, we think the present is a case where the facts proved will justify the inference that there was a due *acknowledgment* of the instrument."

It is thus manifest that a will of real estate, signed by a testator, but not in the presence of the witnesses, must be *acknowledged* by him before them. Such acknowledgment may be express, by declaring the paper to be his will, or the signature to be his signature, or it may be implied from words or acts, such as requesting the witnesses to sign *as such* the will produced by him, but the acknowledgment, however made, must be clear, definite, and explicit, for the reason it takes the place of the clear, definite, and explicit act of signing in the presence of the witnesses.

In commenting upon the case of White *v.* The Trustees of the British Museum, attention has been called to the process or evidence by which the fact of acknowledgment was reached. That proof has been the subject of much criticism. While the legal principles declared by the opinion have been accepted, the application of the principles to the facts of the case before it has been questioned in the courts of this country.

Chancellor Walworth, in Jauncey *v.* Thorne, *supra*, p. 58, says:

"What do the witnesses attest in such a case, where they are entirely ignorant of what the testator is intending to do, or what he has done, or what is the object of obtaining their signatures to the paper which is presented to them for that purpose? Certainly nothing. For they neither attest the instrument as a will which the testator has in fact, though without their knowledge, already signed, nor the fact that he has signed the instrument in their presence, nor that he has admitted to them that it had been signed by him before that time. Surely the attesting witnesses should see the testator, or some one for him, sign the instrument which they were called upon to witness; or the testator should either say or do something, in their presence or hearing, indicating that he intends to recognize such instrument or paper as one which has been signed by him as a valid will, or as having been signed by his authority for the purposes therein expressed."

Jauncey *v.* Thorne, 2 Barb. Ch. 40; S. C. Redfield's Am. Cas. Wills, 655.

The question here, however, is one of law, and its application to the facts of this case, and not, the law being plain, how it was applied by an English court. The text-writers cite the case as authority for the proposition that the production of the will by the testator with the request to witnesses to sign it *as such witnesses* is an implied acknowledgment of an act of the testator to be witnessed.

1 Jarman on Wills, *pp. 81, 82 (5th Am. ed., p. 113).

1 Williams on Ex'rs., *p. 87 (6th Am. ed., p. 115).

Schouler on Wills, sec. 321.

As to the second:

The statute requires not only that the witnesses shall subscribe, but also that they shall attest. When the will is signed by the testator in the presence of the witnesses, what they attest is his signature. When the will is not so signed

but has been previously signed by the testator, what is attested is his acknowledgment, or such words and acts as are legally sufficient to constitute such acknowledgment.

All that Wilkes saw and heard, and he saw and heard all that occurred, as has been shown, was wholly insufficient to constitute an acknowledgment, and hence, as he is the only witness, his attestation could only be at best that of an insufficient acknowledgment.

But apart from this, Wilkes did not attest.

There is not even the form of attestation, for his name is not in the position on the paper of an attesting witness, and he does not say he placed his name on the paper *animo attestandi* though in the wrong place.

When commanded by his master to "sign that paper," it is evident he blindly signed it and left the room.

As he did not attest in form, so he did not in fact.

He never signed *animo attestandi*. He never knew he was a witness, or expected to act as such. He neither signed nor intended to sign as a witness. Porter never asked him to sign as a witness, or anything to that effect, nor indicated, directly or indirectly, that he was to act as such.

"In every case the court must be satisfied that the names were written *animo attestandi*, and their position may, for this purpose, be material."

1 Jarman on Wills, 5th Am. ed., p. 215, treating of wills before 1838.

In re Wilson, L. R., 1 P. & D. 269.

Griffith *v.* Griffith, 5 B. Mon. 511.

Roberts *v.* Welch, 46 Vt. 164.

Adams *v.* Field, 21 Vt. 256.

Odenwaelder *v.* Schorr, 8 Mo. App. 458.

Hall *v.* Hall, 17 Pick. 373.
Schouler on Wills, ss. 333, 334.
Canada's Appeal, 47 Conn. 450.

It is submitted that the judgment below should be reversed.

In conclusion, it is submitted that as the substitution of acknowledgment for signing in the presence of the witnesses was a departure from the letter of the statute, and as the former method of execution necessarily facilitates a perpetration of the evils against which the statute was intended to guard, its further relaxation involved in the judgment under review ought not to be tolerated. The above-mentioned departure led, in England, to the passage of the statute of 1st Victoria, and the tendency of legislation of almost every State in our own country has been to render more rigid the formalities prescribed for the testamentary disposition of real estate.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
Attorneys for Plaintiff in Error.

Codicil, June 4. 1890.

In case my daughter, Elena Porter, shall marry and have heirs, the property she may receive from my estate shall at her death descend to said heirs, but if she shall have no children or the children shall die, the property shall descend to the following persons, viz: The children of David E. Porter, Carlile P. Porter, Theodosia Porter, Elizabeth L. Logan and Richard B. Porter, and my Executors will so invest the proceeds of such property as I may leave to Elena Porter that during her life she may draw interest on the same, to be paid her semi-annually.

David D. Porter

Witnesses
J. Middleton William Walker Messenger
Chauncey Thomas.

FILED.
MAR 10 1896
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States.

OCTOBER TERM, 1895.

ELENA CAMPBELL,
PLAINTIFF IN ERROR,

vs.

GEORGEANN PORTER, CARLILE P. PORTER ET AL.,
DEFENDANTS IN ERROR.

Additional Brief for Plaintiff in Error.

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
For Plaintiff in Error.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

ELENA CAMPBELL, PLAINTIFF IN ERROR, *v.* GEORGEANN PORTER, CARLILE P. PORTER ET AL., DEFENDANTS IN ERROR.	*No.* 137.

ADDITIONAL BRIEF FOR PLAINTIFF IN ERROR.

Certain positions taken by the defendants in error seem to render proper this additional brief.

FIRST. It is said that the court below in special term had no power to admit to probate a will or codicil *as a devise of real estate.*

Such was the law prior to the act of Congress of July 9, 1888 (25 Stat. 246).

Robertson *v.* Pickrell, 109 U. S. 608, 610.

Barbour *v.* Moore, 4 Appeal Cases, Dist. of Col. 535, 544.

But the above act enacted as follows:

"The record of any will or codicil heretofore or hereafter recorded in the office of the Register of Wills of the

District of Columbia, which shall have been admitted to probate by the Supreme Court of the District of Columbia, or by the late Orphans' Court of said District, or the record of the transcript of the record and probate of any will or codicil elsewhere, or of any certified copy thereof, heretofore or hereafter filed in the office of said register of wills, shall be *prima facie* evidence of the contents and due execution of such wills and codicils: *Provided*, that this act shall not apply in any cause now pending in any of the courts of the District of Columbia."

Whatever may be said as to the retroactive operation of that law, there can be no doubt that the record of wills of real estate, admitted to probate since its passage, is *prima facie* evidence as to two matters—contents and due execution.

The question has been before the court of appeals of this District. (Barbour *v.* Moore, 4 Appeal Cases, 535, 544, 545.) Chief Justice Alvey, delivering the opinion of the court and referring to the act of 1888, says:

"This act may be very inartificially formed, but its object and purpose cannot well be mistaken. It is an *evidence act*, and its main purpose manifestly was to impart to the probate of all wills and codicils at least a *prima facie* effect and operation of two matters; that is, *of the contents and of the due execution of the will or codicil*, and thus make the will and probate of record in the office of register of wills a *muniment of title*. If this was not the object, it is difficult to say what the object of the passage of the act really was. Before the passage of this act, the probate of a will in the probate court was without effect as to real estate in this District. This was found to be inconvenient, and attended with difficulties in maintaining titles depending on devises after the lapse of time and the death of witnesses. Hence this act (Robertson *v.* Pickerell, 109 U. S. 608.) What may be the effect of the act upon the probate of a will of *personal estate* is a question that we need not decide."

An examination of the opinion will show that the question was necessarily involved in the decision of the case, and that the statement in the brief for the defendants in error to the contrary is an oversight (pp. 544, 545, 546).

Even if the court below was without jurisdiction to render the judgment the fact remains that the plaintiff in error is aggrieved by the judgment and entitled to have it reviewed. Such a judgment, a muniment of title until reversed, and despoiling the plaintiff in error of her estate exceeding in value $5,000 as found by the court below (R. 11, 12), should surely, if void, as contended, be so declared judically.

Phillips *v.* Negley, 117 U. S. 665.
Carter's heirs *v.* Cutting, 8 Cr. 251.
Windsor *v.* McVeigh, 93 U. S. 274.

SECOND. It is further argued that the case should have been brought here by appeal and not by writ of error.

Ormsby *v.* Webb (134 U. S. 47) is conclusive to the contrary. The proceeding in that case was the same as here—an application to admit a will to probate. The only difference between the two cases is that Ormsby *v.* Webb was tried by a jury and the present was tried by the court. But the mode of trial cannot have the effect of changing the character of the proceeding. In that case Mr. Justice Harlan, delivering the opinion of the court, says (pp. 64, 65):

"We are of opinion that the last motion to dismiss, which proceeds upon the ground that this case is one of equitable cognizance to be reviewed here, if at all, only *upon appeal*, must also be *overruled*. It is, of course, undisputed that a final decree in equity, in the court below, cannot be reviewed here by means of a writ of error. But a proceeding involving the original probate of a last will and testament *is not strictly a proceeding in equity*, although rights

arising out of, or dependent upon, such probate have often been determined by suits in equity. * * * A proceeding in this District for the probate of a will, although of a peculiar character, is nevertheless a case in which there may be adversary parties, *and in which there may be a final judgment affecting the rights of property.* It comes within the very terms of the act of Congress defining the cases in the Supreme Court of this District, the final judgments in which may be re-examined here. If it be not a case in equity, it is to be brought to this court *upon writ of error*, although the proceeding may not be technically one at law, as distinguished from equity. The last motion to dismiss must, consequently, be denied."

THIRD. The brief of the defendants in error entirely mistakes the nature of the proceeding below. The controversy is one which by law is triable by the court without the intervention of a jury. The court, indeed, was without power to summon a jury.

It is true that either party had the right to require a "plenary proceeding" by bill, or petition and answer, and in the course of such proceeding had the further right to require that issues be made up and sent for trial into a court having power to summon a jury. Such are the provisions of the act of 1798 (ch. 101, subch. 15, sects. 16, 17) referred to in the brief. But in the present case neither party required a plenary proceeding, nor, of course, the framing of issues, but the trial was allowed to proceed before the court, which had a perfect right to try and determine the case without either a plenary proceeding or issues. The facts presented to the court were undisputed. There was no evidence whatever offered by the plaintiff in error, and the only witnesses examined in behalf of the defendants in error were the alleged witnesses to the will and codicil, and in respect of their evidence there was no contradiction.

Thus the plaintiff in error, conceding the facts sworn to by the witnesses adduced by the defendants in error, the only question that remained was the legal conclusion to be deduced from such facts, and this was the question certified to the court in general term. The order of the court (R. 6) is "that the question as to the sufficiency of the said paper-writing to devise or dispose of real estate be and the same is hereby certified to the court in general term for hearing in the first instance *upon the evidence aforesaid*. It is thus apparent that the facts were specially found by the court in special term as if by a case agreed or special verdict, and nothing remained but the determination of the legal effect of the facts so certified. And upon this theory the court below acted as is manifest from its judgment. It says (R. 7, bottom of page): "The court finding *upon the facts* set out in the order of the special term that the paper-writing was duly executed by the testator, and subscribed and attested by three witnesses as required by law, it is thereupon considered that the said paper-writing be and the same is hereby admitted to probate as a devise of real estate."

And as in the court below, so here, there are no facts to be tried but merely a question as to the conclusion of law from undisputed facts.

FOURTH. In our brief now on file it is stated that there is no evidence, except what may appear from the inspection of the paper, that Porter *knew* the paper was a codicil or will when he directed Wilkes to sign it, *or at any time before or afterwards*. Alden and Thomas simply testify they saw Porter sign "*the said paper-writing*," and thereupon, at his request, subscribed their names to it as witnesses (R. 10). There is no evidence that Porter informed them, or either of them, that the paper was a codicil or will, or what was its nature or character, or that it was his act, and he certainly made no intimation to Wilkes that he knew what the

paper was; nor is there any evidence, except what may appear from the paper itself, that Porter *at any time*, either before or after he signed it, knew that the paper was a codicil or will, or that it was his act.

The paper might have been placed in Porter's hands by some one who represented to him that it was *a deed or other instrument*, and Porter might have signed it in the presence of Alden and Thomas, and requested them to subscribe their names as witnesses, *in entire ignorance of its real nature or purport*. There must be affirmative evidence that the testator knew the paper was a will or codicil, *and that evidence cannot be deduced from the face of the paper alone*.

In each of the cases commented upon in our brief now on file, namely, Osborn *v.* Cook (11 Cushing, 532); White *v.* The Trustees of the British Museum (6 Bing. 310); Wright *v.* Wright (7 Bing. 457), and Hogan *v.* Grosvenor (10 Met. 54), *the whole of the will was in the handwriting of the testator*, and this fact enabled the court to find that he *knew* what he signed. In Ilott *v.* Genge (3 Curteis, 118), cited in the opinion of the court below, the fact that a testator *had written the will himself*, and signed it, is made an important factor.

Gerrish v. *Nason*, 22 Maine, 438 (S. C. 39 Am. Dec. 589), was decided in 1843. *The Maine statute was the same in substance as the statute of Charles II.* It appeared from the testimony of the attesting witnesses that there were no persons present at the execution of the will but themselves and the scrivener, who was also the executor and a legatee; *that they saw the deceased sign and were requested by her to see her sign her name;* that the instrument was not spoken of by any one present as a will; that its character was not mentioned, but that nothing was said about it. The witnesses severally testified that they did not know the instrument they had witnessed was a will, while they were

present at that time. Whitman, C. J., delivering the opinion of the court, says:

"The next question is, if the testatrix were proved to be sane, was it necessary to be proved that she knew the instrument which she executed to be an expression of her will in the disposition of her estate? These instruments are often prepared for persons in the last stages of existence to execute, and at a time when both body and mind have become more or less enfeebled, and when great anxiety and depression have been superinduced, and even sometimes when there is but a glimmering of reason flickering in the socket. What can be more reasonable that in such a case *there should be something more than a mere legal presumption arising from the act of signing that a testator knew the paper signed by him to be his last will?* In the case of *Sweet et al.* v. *Boardman et al.* (1 Mass. 258), the judges delivered their opinions individually, and each stated it was necessary it should appear that the testator knew that it was his will he was signing; and Mr. Dane (Vol. 4, p. 568) recognizes the same principle. If the testatrix, in this case, *had written the will herself*, it would have been apparent that she knew it was her will; *but it was not in her handwriting*, and it does not appear that she had ever read it, or heard it read; and nothing was said in the presence of the attesting witnesses whether the writing they were attesting was a will or not. If these witnesses were all dead it might be reasonable to presume that all was said and done at the time which might be requisite to uphold the will, but such is not the case. *They being alive, and the transactions recent, nothing is to be presumed, without evidence, to have transpired beyond what they state.*"

Mr. Greenleaf says:

"It is incumbent on the party *asking for the probate of a will* affirmatively to establish that the testator, at the time of executing it, *knew* that it was his will."

2 Green. Ev., sect. 675.

In support of this statement he cites White *v.* The Trustees of the British Museum (*supra*), Sweet *v.* Boardman (*supra*), 4 Dane Abr. (*supra*), and Gerrish *v.* Nason (*supra*).

W. D. DAVIDGE,
W. D. DAVIDGE, JR.,
For Plaintiff in Error.

Office Supreme Court U. S.
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OCTOBER TERM, 1895.

No. 137.

ELENA CAMPBELL, PLAINTIFF IN ERROR,

vs.

GEORGEANN PORTER ET AL.

Brief for Defendant in Error.

CHAPIN BROWN,
Attorney for the Defendants in Error.

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ELENA CAMPBELL, PLAINTIFF IN ERROR,

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Brief for Defendant in Error.

AS TO THE WRIT OF ERROR.

This case is not properly before this court for review.

The case should have been brought here by *appeal* and not by *writ of error.*

The proceedings under which this case was tried below are provided for in the Maryland Act of 1798, Ch. 101, Subch. 15, Secs. 16 and 17.

2 Kilty, p. 852.

Dennis' Probate Law, D. C. pp. 101, 105.

The case of Ormsby *vs.* Webb, decided by this court and reported in 134 U. S. p. 47, does not apply to the case at bar, as in the former case the questions at issue had been determined by a trial and verdict of a jury and exceptions were taken at the trial, and a writ of error was held *in such a case* to be the proper proceeding for bringing that case to this court for review.

But in the present case all of the testimony was taken under the law by depositions in writing and tried and determined by the General Term of the Supreme Court of the District of Columbia, sitting as an Orphans' Court, without a jury trial. There is no provision of law or of practice for framing a bill of exceptions in this case (Stewart *vs.* Pattison's Exer., 8 Gill, pp. 46, 54), and the law relating to trial and appeal, where the facts are tried by the court on depositions in writing, is different from that relating to trial by jury.

Dennis' Probate Law D. C. p. 108, reciting the law of Maryland on this subject.

But, as will be shown hereafter, the Orphans' Court had no jurisdiction to try any question relating to a *devise of real estate*, and was without jurisdicton to pass the order admitting the codicil to probate *as a devise of real estate*.

The Court in General Term of the Supreme Court of the District of Columbia was sitting as an Orphans' Court when it passed this order, and had only the powers and jurisdiction of the Orphan's Court.

When the court ordered that the codicil *be admitted to probate* in respect of *personal property*, the powers and jurisdiction of the Orphan's Court were exhausted and final, and there was no appeal from this order, or exception taken to the order in this respect.

AS TO THE JURISDICTION OF THE ORPHANS' COURT AS TO WILLS OF REAL ESTATE.

The Orphans' Court has no power whatever to admit a will or codicil to record and probate *as a devise of real estate*.

The only power conferred upon the Orphans' Court by law is to admit to probate "wills of personalty" and "wills appointing an executor." No power whatever is conferred by law upon the Orphans' Court to admit to probate a will

conveying or devising *real estate*, and *not* conveying or bequeathing *personalty* or appointing an *executor*.

The law in relation to the powers and jurisdiction of the Orphans' Court to admit wills to probate are contained in the—

Maryland Act of 1898, Ch. 101, Subch. 2, Secs. 6 to 13.
2 Kilty, p. 832.
1 Dorsey, p. 372.
Compiled Statutes of D. C., p. 560.
Dennis' Probate Law D. C. p. 32, Sec. 12.

Under the Law of Maryland of 1715, Ch. 39, Sec. 29 (Bacon's Laws, Deputy Com. Guide, 4), the Commissioners were empowered to take probate "even though the wills concerned land." But by the Act of Maryland of 1798, Ch. 101, the Orphans' Court was empowered to take probate of wills relating to personal property only or appointing an executor, and this is the only law now in force in the District of Columbia, relating to the probate of wills.

It was not until the Act of Maryland of 1831, Ch. 315, that the Orphans' and Probate Courts of Maryland again had jurisdiction to take the probate of wills of lands.

Warford et al., Lessee, *vs.* Calvin, 14 Md. 532.

Nor does the Act of Congress of July 9, 1888, confer this jurisdiction.

Compiled Statutes D. C. p. 560, Sec. 18; 25 Stat. 246.
Robertson *vs.* Pickrell, 109 U. S. Rep. 608.
McIntire's Will, 5 Mackey Rep. 293.

The Act of Maryland of 1831, Ch. 315, renders the record of any will probated by the Orphans' Court prima facie evidence of the contents and due execution thereof, but the act first, in express terms, confers the power and jurisdiction on

the Orphans' Court to probate wills of realty. Our Act of Congress of July 9, 1888, (25 Stat. 246) does not enlarge the powers and jurisdiction of our Orphans' Court so as to enable it to probate wills of realty.

It is plain, therefore, that when the Orphans' Court admitted to probate this codicil, it exhausted its power and jurisdiction and it has no power to admit this codicil to probate as a devise of real estate.

In the case of Barbour *vs.* Moore (Washington Law Reporter, Vol. 22, p. 792) the court below (Mr. Justice Bradley) held that the Orphans' Court had no power to admit a will to probate as a devise of real estate, and that consequently the record of the probated will was not evidence under the U. S. Statute of July 9, 1888, (25 Stat. 246), of the contents and due execution of such will. The execution of the will was afterwards proven, at the trial, and the contestants of the will in the suit (ejectment) waived the point as to the record being evidence. The Court of Appeals of the District of Columbia, however, in hearing the case on appeal, held that the Act of July 9, 1888, (25 Stat. 246) did make the record of a probated will by the Orphans' Court, *prima facie* evidence, &c. But from the opinion of the Court of Appeals (Washington Law Reporter, Vol. 22, p. 793) it is clear that the decision of this question was not necessary to the determination of the court in reference to that case, and was not pressed by counsel in argument.

AS TO THE MERITS.

The brief for the appellant and the opinion of the lower court (filed with her brief and also reported in 20 D. C. Rep. 493) give all the cases bearing upon the question at issue. In some of the cases cited, where the will has been wholly in the handwriting of the testator, the counsel for the appellant, have italicized the language of the court, in reciting

such fact in their opinions, and I infer that it is thereby attempted to draw a distinction between such cases and the one at bar. But I respectfully call the attention of the court to the principles upon which these cases are decided, and which I submit are all applicable to the facts in the present case, and fully sustain the decision of the court below in favor of the appellees.

CHAPIN BROWN,
Attorney for the Defendants in Error.